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In The

Supreme Court of the United States

October Term, 1997

AT&T CORP., et al.,

Petitioners,

v.

IOWA UTILITIES BOARD, et al.,

Respondents.

AT&T CORP., et al.,

Petitioners,

v.

CALIFORNIA, et al.,

Respondents.

MCI TELECOMMUNICATIONS CORPORATION,

Petitioner,

v.

IOWA UTILITIES BOARD, et al.,

Respondents.

(Actions continued on inside of cover)

On Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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Petitioners,

v.

IOWA UTILITIES BOARD, et al.,

Respondents.

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QUESTION PRESENTED

Whether the Federal Communications Commission (FCC) may preempt the State public service commissions' discretion to implement key provisions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act). Specifically, did Congress intend the FCC to direct how the States set prices for local telephone services and facilities in those instances where incumbent local providers and competitors are unable to agree upon prices.

LIST OF PARTIES

The parties to the proceedings in the Eighth Circuit are listed at Pet. App. 1a-4a, 73-79a, 91a. *See* note 1, *infra*.

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OPINIONS BELOW

The principal opinion of the Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC* (Pet. App. 1a-67a),[1] as amended by the Court's order on rehearing (Pet. App. 69a-72a), is reported at 120 F.3d 753. The Federal Communications Commission (FCC) order reviewed by the Eighth Circuit – *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (excerpts of which are reproduced at Pet. App. 131a-337a) – is reported at 11 F.C.C.R. 15,499 (1996).

JURISDICTION

The judgment of the court of appeals in *Iowa Utilities Board* was entered on July 18, 1997. A subsequent order in that case, granting rehearing in part and denying rehearing in part, was issued on October 14, 1997. (Pet. App. 1a-67a, 69a-72a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996,

[1] References to "Pet. App." are to the Appendix filed by petitioner AT&T in No. 97-826.

Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151-276, appear at Pet. App. 93a-130a.

STATEMENT OF THE CASE

The statute at issue is the Communications Act of 1934, as amended by the Telecommunications Act of 1996. The controversy surrounds the Federal Communications Commission action preempting the State public service commissions' discretion to implement key provisions of the Act, including the right to set prices for the services and facilities necessary to bring competition to the local market.

The telephone network is used predominantly for calls that originate and terminate in the same state (intrastate calls). Because this network also carries calls that cross state boundaries, Congress chose to provide for federal regulation of interstate transactions. However, the 1934 legislation, and the more recent amendments, continue to protect States' police power authority over intrastate calls through an express reservation in section 2(b) of the Communications Act, 47 U.S.C. § 152(b). This Court has strictly enforced this jurisdictional reservation of authority finding section 152(b) acts as both a substantive jurisdictional limitation on the FCC's authority and also a rule of statutory construction. *See, e.g., Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

Congress, in the 1996 amendments to the Act, specifically chose to preserve this historic reservation of State authority. The 1996 legislation provides a framework to

open all local (intrastate) telephone markets to competition. This framework is specifically designed to eliminate regulatory barriers to local phone competition, subject to competitively neutral protection of public welfare and consumer interests by the States. It also assigns a broad range of new responsibilities to incumbent and competitive telecommunications carriers, the FCC and the States.

The Act contemplates that incumbent local (intrastate) phone service providers will privately negotiate agreements to interconnect with other competitors. These negotiations are targeted at assuring competitors are able to compete in the local service market. The agreements include prices that incumbents charge for resale of local service and "leasing" arrangements.[2] Only if negotiations fail will government regulation play a role. When agreement cannot be reached, the Act, in section 252, specifies pricing standards and other requirements for arbitration. Section 252 expressly directs State commissions to set prices and arbitrate according to those requirements. Only in the instance that a State fails to take action does the Act authorize the FCC to fulfill the State role of setting prices and arbitrating disputes in local competition matters. In spite of this clear statutory mandate, the FCC action, reversed by the Eighth Circuit decision under

[2] Rather than just resell the incumbent providers' service, competitors can lease discrete parts of the network – called "unbundled network elements" – and combine them with their own facilities to provide local service.

review, attempted to establish its own parameters for State pricing.

A. The Regulation of Telephone Service Prior to 1996

Although the first telephone patent was issued in 1876, telephone service was virtually unregulated until the Twentieth Century. *"State of New York Investigation of Telephone and Telegraph Companies – Proceeding of Joint Committee,"* Vol. 1 (1910). The need for regulation became apparent in the early 1900s as the number of telephone service providers mushroomed and numerous problems arose. State legislatures throughout the nation established public service commissions to regulate the provision of telephone service. *The Regulation of Interstate Telephone Rates*, 51 HARV. L. REV. 846, 847 (1938).

The Mann-Elkins Act of June 18, 1910, extended the jurisdiction of the Interstate Commerce Commission (ICC) to interstate telephone service, but the ICC had scant resources and recognized that over 90 percent of all telephone calls were local in nature, *a fact that remains true today.*[3] Finding "[t]he great bulk of telephone business is of strictly local concern, and the State commissions are much better informed and equipped than we are to pass

[3] The ICC estimated the proportion of intrastate calls at 98 percent. According to the FCC, 91 percent of telephone calls are intrastate and only 9 percent are interstate in nature. 1996 FCC STATISTICS OF COMMUNICATIONS CARRIERS 26. *Notably, in 1993 there were more intrastate telephone calls made in one state, California (70+ billion), than there were interstate telephone calls made in the entire United States (52+ billion). Id.*

upon the conditions surrounding the local service," the ICC determined not to actively regulate telephone service. *Depreciation Charges of Telephone and Railroad Companies*, 118 I.C.C. 295, 374 (1926).

In *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), this Court made clear that the provision of telephone service has both intrastate and interstate components and that the intrastate component, a matter of primarily local concern, is subject to exclusive State regulation. The Court in *Smith* also indicated that in order to preserve the proper limits of State and federal jurisdiction over telephone service, the jurisdictional separation of interstate and intrastate costs was necessary. *Id.* at 148-149.[4]

In 1934, when Congress transferred telephone regulation from the ICC to the newly created Federal Communications Commission, it went to great lengths to ensure that the dual jurisdictional principle of *Smith v. Illinois* applied. In addition, through section 2 of the Act, 47 U.S.C. § 152, Congress created a system of dual federal/state regulation which granted the FCC jurisdiction over interstate communications, 47 U.S.C. § 152(a), while reserving to the States existing jurisdiction over intrastate

[4] To facilitate the FCC's compliance with section 152(b), the 1934 Act authorized the FCC to engage in jurisdictional separation of telephone company costs into interstate and intrastate components 47 U.S.C. § 221(c). Ch. 652, Title II, section 221, 48 Stat. 1080 (June 19, 1934). *See, e.g., Crockett Telephone Co. v. FCC*, 963 F.2d 1564, 1566-67 (D.C. Cir. 1992); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1103-05 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

matters, 47 U.S.C. § 152(b). Section 152(b) provides in part:

> [N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service. . . .

This provision expressly preserves States' authority over intrastate telecommunications and specifies that the Act must not be "construed" to give the FCC jurisdiction over local/intrastate matters.[5]

From 1934 through the early 1970s, under the aegis of the dual jurisdictional scheme, the United States telecommunications industry grew from a fairly primitive network into the most sophisticated, reliable, technologically-advanced and affordable system in the world.

By the early 1970s a shift in regulatory policy began to occur, due in part to the recognition that advancing technologies had created opportunities for new competitive ventures. The telecommunications industry, which was once viewed as a "natural monopoly," could no longer be understood or regulated solely that way.[6] In

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[5] The only exceptions are expressly stated in the text of section 152(b). ("Except as provided in sections 223 through 227, inclusive, and section 332, and subject to the provisions of section 301 and title VI, *nothing in this chapter. . . .* ") (*emphasis added*)

[6] The FCC acknowledges in its statement that for many years telephone regulators assumed that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network. (FCC br. at 5.)

1982, the U.S. Department of Justice and AT&T entered into a consent decree under which AT&T was required to divest itself of the regional Bell operating companies. *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub. nom., Maryland v. United States*, 460 U.S. 1001 (1983). The provision of interstate and most intrastate long distance telephone service thereafter became subject to a competitive market. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d at 1105-11.

Many State legislatures and State regulatory agencies began to encourage competition in their local markets. These efforts were in place in many States long before the passage of the Telecommunications Act of 1996.[7] Even the FCC recognizes that progress in States towards competition predates the 1996 amendments. Indeed, the FCC borrowed extensively from State initiatives in reaching its decisions. *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15,499 (1996) [hereinafter *First R&O]* (Pet. App. 155a, 157a).

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[7] A June 1996 report from the Morgan Stanley firm characterized 15 states, representing 48 percent of the nation's access lines, as "in the advanced stages of the process towards local competition." Another 11 states, representing an additional 27 percent of the access lines in the country, were described as being "at the middle stages of the regulatory process" moving towards local competition. *See*, COMFORT, ET AL., *"Telecommunications Services: National Survey of Local Competition Issues: A State by State View,"* Morgan Stanley & Co., New York, N.Y. (June 1996).

B. The Telecommunications Act of 1996

In February 1996, Congress passed the Telecommunications Act of 1996. Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56, *codified at* 47 U.S.C. § 151, *et seq.* (1996). This amendment to the 1934 Act adopts a framework to open all local telecommunications markets to competition and eliminates regulatory barriers to competition in the telecommunications industry, subject to the States' competitively neutral protection of public welfare and consumer interests. A critical component of the Congressional scheme is found in sections 251 and 252 of the Act. These sections explain how Congress expects new entrants to interconnect with the incumbent local phone service providers.

In lieu of active regulation, Congress sought to rely primarily on private negotiations between competitors to resolve the broad range of technical and pricing issues associated with interconnection and access to the facilities and services of the incumbent provider, the local exchange carrier.

The 1996 Act sets forth a specific set of local exchange carrier duties. With great particularity, Congress identified those functions, features and services that incumbent local exchange carriers must make available to competing local exchange carriers, as well as the mutual duties of the carriers. *See* 47 U.S.C. §§ 251(b) and 251(c). Section 252 provides that agreements on interconnection,[8]

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[8] Interconnection is the physical linking of two networks which allows a local competitor to connect with the incumbent local exchange carrier's network. (Pet. App. 5a).

transport and termination,[9] resale,[10] and the purchase of unbundled network elements[11] depend, in the first instance, on private negotiations without government intrusion. To the extent that negotiations fail, carriers may request State commissions to mediate or arbitrate disputes. The Act establishes specific pricing standards under section 252(d) that are to be used by the State commissions only in the event parties cannot agree on prices and seek arbitration under section 252(b). Final agreements, whether voluntarily negotiated or adopted through arbitration, are brought before the State commissions for approval. Competitors that reach agreements voluntarily or through State-sponsored mediation are not subject to the standards set out in sections 251(b) and 251(c) of the Act, nor are they subject to the pricing standards in section 252(d). Only if voluntary negotiations fail and a State commission fails to carry out its responsibility under section 252 is the FCC empowered to "assume the responsibility of the State commission . . . ." 47 U.S.C. § 252(e)(5).

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[9] Transport and termination is the process whereby a call that is initiated by a customer of one telecommunications carrier is routed to a customer of a different carrier and completed by that carrier. The carrier completing the call charges for the cost of terminating the call. (Pet. App. 7a).

[10] A local exchange carrier is required to sell to its competing telecommunications carriers, at wholesale rates, any telecommunications service that the incumbent local exchange carrier provides to its customers at retail rates. (Pet. App. 5a).

[11] A local exchange carrier is required to provide its competing telecommunications carrier with access to individual elements of the incumbent local exchange carrier's own network on an unbundled basis. (Pet. App. 5a).

The overarching purpose of sections 251 and 252 is to give customers a choice of competing providers for local telephone service, just as they have a choice among providers for their interstate calls. Consistent with the States' historic role in regulating local exchange service, Congress gave State commissions the predominant role in implementing local competition initiatives and an exclusive role in setting rates if the parties cannot reach agreement.

C. The FCC Orders Below

On August 8, 1996, six months after passage of the 1996 Act, the FCC released its first order on local competition. In the *First R&O*, the FCC contended that sections 251, 252, and 253 of the Act require it to establish rules to govern interstate and intrastate prices for interconnection, transport and termination, resale, and the purchase of unbundled network elements. (Pet. App. 190a, 191a, 201a, 210a). It asserted that the 1996 Act creates a "parallel" jurisdiction scheme for the FCC over both interstate and intrastate matters under sections 251 and 252. (Pet. App. 190a-192a). The FCC claimed that section 152(b) did not prevent the FCC from regulating intrastate matters because Congress intended the FCC to adopt national pricing rules in order to promote opportunities for competition, help States review contested agreements in a timely fashion, create certainty for competitors, and ensure consistent federal court decisions. (Pet. App. 211a-212a). The FCC claimed it preempted any State regulations not consistent with the FCC's implementing regulations. (Pet. App. 201a-202a). It also asserted that the 1996 Act authorized it to engage in appellate review of

State decisions reached in arbitration disputes through the complaint procedures established by 47 U.S.C. § 208. (Pet. App. 219a-220a).

D. The Eighth Circuit Decisions

The Eighth Circuit Court of Appeals concluded that the FCC exceeded its jurisdiction in promulgating the pricing rules in the *First R&O*. (Pet. App. 13a). The court first found that the plain text of sections 252(c)(2) and 252(d) expressly authorize the State commissions to determine the prices an incumbent local exchange carrier may charge for its facilities or services, in the event private negotiations fail. It rejected the claim that sections 251 or 252 grant the FCC jurisdiction to issue rules governing the rates for interconnection, unbundled access, resale, and the transport and termination of telecommunications traffic in arbitration proceedings.

The court further determined that any ambiguity regarding the FCC's authority over local telecommunications pricing under the Act is resolved by the operation of section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b). (Pet. App. 15a). Inasmuch as section 2(b) safeguards the States' regulation of local rates and service, the FCC's express authority over local competition is limited to six provisions, none of which endorses the

activity at issue. The Eighth Circuit concluded that the FCC's order runs afoul of section 2(b).[12]

SUMMARY OF ARGUMENT

Section 2(b) expressly prohibits the FCC from preempting the States' regulation of the rates telephone companies may charge for intrastate services and facilities. The FCC order under review preempts the States from setting rates for intrastate services and facilities in any manner other than that dictated by the FCC's rules. The FCC has unquestionably preempted intrastate ratemaking.

This Court has held that Congressional denial of power to the FCC in section 152(b) can only be overcome if Congress is "unambiguous" and "straightforward" and expressly grants the FCC authority over matters traditionally reserved to the States. *Louisiana*, 476 U.S. at 377. Inasmuch as the Telecommunications Act of 1996 neither assigns to the FCC authority to set local rates for interconnection and access, resale, and termination and transport, nor modifies section 152(b), the Eighth Circuit

[12] The Eighth Circuit rejected the FCC's attempt to invoke the "so-called" impossibility exception to 2(b) because, it reasoned, the FCC had not demonstrated that the States' authority to establish the rates in connection with the local competition provisions of the Act would negate any valid authority the Commission had over interstate communications since the Act clearly indicates Congress did not intend for the FCC to issue any pricing rules. (Pet. App. 20a-24a).

decision annulling the FCC's preemption of State rate regulation should be upheld.

Section 252 provides, in the first instance, for competitors to resolve privately a broad range of issues associated with interconnection and access to a local exchange carrier's facilities and services, irrespective of the rules established by the Act or the regulators. The only standard for approval of privately negotiated agreements by the States is that the resulting agreement be nondiscriminatory and in the public interest.

In the event private negotiations are unsuccessful, section 252 explicitly directs the States to set prices. Even if one chooses to ignore the express statements in the statute, the legislative history clarifies the States' role with respect to pricing.

Section 251(d)(1) does not even imply, much less declare unambiguously, that the FCC may preempt the States. Rather, Congress chose in section 251(d)(1) to give the FCC six months to promulgate regulations implementing section 251 in six enumerated areas. Pricing for interconnection and access, resale, and termination and transport are not among the items enumerated. Further, the plain language of section 251(d)(3) prohibits FCC preemption unless the FCC can demonstrate that only its pricing requirements comply, not with FCC rules, but with Congressional directives.

Section 201(b) and the various other provisions relied upon by the FCC (sections 303(r) and 154(i)) as allegedly endorsing preemption, simply envision FCC regulation of interstate and foreign matters. They do not grant the FCC jurisdiction to set rates pursuant to section 252.

Most importantly, section 152(b) expressly reserves to the States the authority to set intrastate prices for interconnection and access, resale, and termination and transport. The unequivocal language of section 152(b) confirms that Congress intended to preserve State authority to regulate intrastate communications.

Finally, the Congressional scheme limiting FCC preemption of the local competition provisions has neither stopped nor delayed competition. It is the function of the FCC (and the States) to carry out the Act in the manner intended by Congress and not in the manner intended by FCC officials.

ARGUMENT

THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996, RESERVES TO THE STATES THE RIGHT TO CONDUCT ARBITRATIONS AND SET RATES TO OPEN THE LOCAL MARKET TO COMPETITION WITHOUT PREEMPTIVE FCC INTERVENTION.

In this case, the FCC has expressed its intent to preempt State regulation of interconnection, network elements, resale, and transport for intrastate ratemaking. The preemption doctrine, which has its roots in the Supremacy Clause, U.S. Const. art. VI, cl. 2, "requires [the courts] to examine Congressional intent." *Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982). The Court has found Congressional intent to preempt State law (1) where there is an explicit statement of legislative intent to preempt, (2) where the legislative intent may be inferred from the comprehensiveness of the

federal regulation, or (3) where the intent may be inferred because the federal interest in the field is so dominant. *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985). Thus, preemption analysis ultimately turns on the will of Congress. *de la Cuesta*, 458 U.S. at 162.

This Court has stated many times how issues of preemption should be resolved:

> Where . . . the field which Congress is said to have pre-empted has been traditionally occupied by the States, see, e.g., U.S. Const. Art. I, § 10, Patapsco Guano Co. v. North Carolina, 171 U.S. 345, 358 (1898), "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). This assumption provides assurance that "the federal-state balance . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has "unmistakably . . . ordained," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963), that its enactments are to regulate a part of commerce, state laws regulating that aspect of commerce must fall.

Jones v. Rath Packing Co., 430 U.S. 519, 525, *reh'g. denied*, 431 U.S. 925 (1977).

The regulation of utilities is one of the most important functions traditionally associated with the police power of the States. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983), *citing Munn v. Illinois*, 94 U.S. 113 (1877). Intrastate ratemaking lies at the heart of the local regulatory duties reserved to the State in section 152(b). *Louisiana*, 476 U.S. at 375-76.

In the Telecommunications Act of 1996, Congress is regulating local telephone service,[13] an area traditionally occupied by the States. Congress preempted the States in this area to the extent it prescribed a framework to achieve competition in the local exchange market. However, both the statutory language and the legislative history demonstrate an intention by Congress not to preempt States' traditional ratemaking and other authority over the local market. Indeed, the Communications Act, as amended by the 1996 Act, preserved the States' authority to set intrastate rates.

A. The FCC Has No Authority Under Sections 251 and 252 To Preempt State Ratemaking.

1. The plain language of sections 251 and 252 directs the States to set rates.

In the spirit of reducing regulation, Congress, in the first instance, allowed new competitors and incumbent local exchange carriers to adopt their own agreements on how new competitors would interconnect or use the incumbents' facilities.[14] If the negotiations fail, Congress

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[13] The FCC has stated, "Section 251 pervasively regulates many aspects of local exchange services, the paradigmatic intrastate markets." *FCC v. Iowa Utilities Board*, No. A-299, Application to Vacate Stay at 22 (October 24, 1996). Indeed, the FCC concedes in its opening brief that Congress designed the local competition provisions of the Act to open local markets to full competition. (FCC br. at 5).

[14] This regulatory approach, based on mutual agreement rather than hands-on regulation, is the most striking evidence that Congress never intended the rigid nationwide pricing framework envisioned by the petitioners. Competitors are not

directed that one regulatory body, the State commission, would arbitrate agreements and set prices.[15]

More specifically, section 252 sets the procedures for negotiation, arbitration, and approval of agreements. Agreements are to be reached through voluntary negotiations. 47 U.S.C. § 252(a)(1). After a certain period, either party to the negotiations may seek assistance from the State commission on any "open issue" in the negotiation, including rates. 47 U.S.C. § 252(b). In resolving rate issues by arbitration, a State commission is directed to "establish any rates for interconnection, services, or network elements according to subsection (d)," 47 U.S.C. § 252(c), a function the Eighth Circuit described as "fundamentally intrastate in nature." (Pet. App. 22a). Subsection (d) contains the pricing standards to be used by the States to price interconnection and unbundled network elements,

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bound by the Act's substantive standards in conducting voluntary negotiations. 47 U.S.C. § 252(a)(1).

[15] Section 252(c) provides the standards to be applied in resolving open issues in arbitrations:

> Standards For Arbitration – In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, *a State commission shall* –
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;
>
> (2) *establish any rates for interconnection, services, or network elements according to subsection (d);* and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. (*emphasis added*).

transport and termination, and resale. Conspicuously absent is any command that the FCC engage in price setting.[16]

Further, section 252(e) requires the States to reject agreements adopted through arbitration only if they do not meet the requirements of section 251, including the Commission's regulations *or* the pricing standards set forth in subsection (d).[17] Section 252(e)(5) expressly limits the FCC's role in arbitrations to situations where "a State commission *fails to act* to carry out its responsibility under this section." 47 U.S.C. § 252(e)(5) (*emphasis added*). Then, and only then, is the FCC authorized to assume the responsibility of the State commission to arbitrate or approve agreements, including setting rates.[18] State

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[16] Under the pole attachment statute (47 U.S.C. § 224(c)) a State may set the rate that a pole owner may charge a cable television company for attaching its wires to the pole. The rate set by the State is then used by the FCC to set the cable company's rates. *See United States v. Southwestern Cable*, 392 U.S. 157, 177-178 (1968).

Thus, even if the Eighth Circuit reading of the Act ultimately results in State-established rates being reflected in interstate prices, such a result would be consistent with action already taken by Congress. Further, the FCC acceded to the States' regulation of interstate matters recognizing that the States' authority under section 252 extends to both intrastate and interstate matters. (Pet. App. 191a).

[17] Had Congress intended the FCC to set pricing rules, it would not have directed the States to follow the pricing standards contained in the Act under 252(d), *in addition to* the section 251 requirements.

[18] The FCC has argued that the Court should give it deference, however, as the Court has often stated, "The judiciary is the final authority on issues of statutory

commission determinations under section 252 are to be reviewed in an appropriate Federal district court. 47 U.S.C. § 252(e)(6).

2. Section 251 of the Act does not grant the FCC the authority to set rates.

The FCC contends Congress grants it broad authority to issue regulations governing the ratemaking methods by which State commissions establish prices as well as other aspects of local competition. To support its view, the FCC constructs a strained patchwork from statutory fragments contained in section 251. These alleged indicia of jurisdiction stand in sharp contrast to the straightforward grant of pricing authority to the States found in sections 252(c) and (d), and the express grant of authority to the FCC found only in six provisions in section 251.[19] Accordingly, the Eighth Circuit concluded that nowhere in the Act is the FCC granted the expansive role in implementing local competition that the FCC conferred upon itself. (Pet. App. 10a, 12a-13a, 14a).

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construction and must reject administrative constructions which are contrary to clear Congressional intent." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[19] These provisions also stand in sharp contrast with the Cable Act. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.). In the Cable Act, Congress explicitly granted the FCC the authority to regulate the rates of cable companies and explicitly required State authorities to follow the FCC's ratemaking rules. *See* 47 U.S.C. §§ 543(a), (b)(2)-(3). *See also* Pet. App. 14a.

The FCC rests its authority to preempt on section 251(d)(1) directing that "[w]ithin 6 months after the date of enactment . . . [it] shall complete all actions necessary to establish regulations to implement the requirements of this section" – that is, section 251. (Pet. App. 212a-214a). This section can only be read, as the Eighth Circuit did, "primarily as a time constraint, directing the Commission to complete expeditiously its rulemaking regarding *only the areas in section 251* where Congress expressly called for the FCC's involvement." (*emphasis added*) (Pet. App. 12a).

Specifically, the FCC's rulemaking authority under section 251(d)(1) is limited to subsections 251(b)(2) (number portability), 251(c)(4)(B) (prevention of discriminatory conditions on resale), 251(d)(2) (unbundled network elements), 251(e) (numbering administration), 251(g) (continued enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents). In each of these provisions, Congress expressly directs the FCC rules be followed.

The FCC claims pricing authority from the mention of rates in section 251(c). In section 251(c) Congress required interconnection, 47 U.S.C. § 251(c)(2)(D), and unbundled access, 47 U.S.C. § 251(c)(3), to be provided by the local exchange carrier "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory[20] in

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[20] Words such as just, reasonable, and nondiscriminatory do not confer preemptive authority on an agency unless that agency is directed by Congress to preempt. As the court noted in *Pennzoil Co. v. FERC*, just and reasonable is merely a term of art for the public interest. 645 F.2d 360, 379 n.37 (5th Cir. 1981).

accordance with the terms and conditions of the agreement and the requirements of this section and section 252."[21] The FCC's argument that section 251(d)(1) authorizes it to set pricing regulations is belied by the Act itself. Section 251(d)(1) only authorizes the FCC to take "actions necessary" to implement section 251. The rates for resale, interconnection and network elements are first left for the parties to determine, 47 U.S.C. § 252(a)(1), and if they cannot be resolved privately, then the States are directed to establish the prices based upon the standards set forth in section 252(d). Thus, Congress did not find it "necessary" under section 251 for the FCC to set prices pursuant to section 252.

Further, if the FCC had been granted the authority to adopt regulations to determine prices, the standards would have been included in section 251(d), as the access standards were, or the FCC would have been granted express authority to issue pricing regulations. *Cf.* 47 U.S.C. § 251(d)(2). The authority to apply the pricing standards was expressly granted to the State commissions without direction from the FCC.[22]

The appearance of the words "just and reasonable" in the 1996 Act cannot confer substantive pricing jurisdiction on the FCC.

[21] Rates are to be determined in the arbitration in accordance with section 252, which contains the substantive pricing standards, and the terms and conditions in the agreement are to be in accordance with section 251, including the limited areas of FCC authority.

[22] AT&T cites *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), as evidence of a statutory scheme where the federal agency was authorized to adopt rules binding States in setting rates even when the State bodies were directed to establish

As discussed below, the FCC raised similar arguments in *Louisiana* in attempting to overcome Congressional reservation of jurisdiction to the States. While acknowledging the statute contained some internal inconsistencies, the Court held the absence of express authority defeated the FCC's claim. 476 U.S. at 379. In this case, the FCC's arguments are far weaker than in *Louisiana*. Section 251(d)(1) expressly limits the FCC's rules to those necessary to implement section 251, and nowhere in section 251 is the FCC authorized to set prices pursuant to section 252(d).

3. Section 251(d)(3) is a bar to preemption.

The FCC's *First R&O* broadly preempts State rate regulation. Notwithstanding the FCC's claim that it was only preempting as necessary, Pet. App. 201a-202a, the FCC directed that State requirements be consistent with the FCC's far-reaching implementing regulations. (Pet. App. 202a).[23]

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rates. (AT&T br. at 26). However, the statute in *Wilder* expressly gave the federal Secretary an oversight role over rates. That statute provides an example of the language Congress uses when expressly granting a federal agency authority over the States' ratemaking.

[23] The FCC made this preemptive sweep without considering whether a State-specific effort at introducing competition, including the use of a different pricing methodology, would be inconsistent with the Act or substantially prevent implementation of the will of Congress.

The FCC argues section 251(d)(3) is not a bar to preemption but actually provides authority to promulgate preemptive rules.[24] In reality, the opposite is true as the Act actually preserves State access regulation.[25] The Eighth Circuit stated:

> The FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical. It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II. In this circumstance, subsection 251(d)(3) would prevent the FCC from preempting such a

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[24] Legislative history belies the FCC interpretation. The bill passed by the Senate, S. 652, included the requirement that State rules not be inconsistent with the Commission's regulations. *See* S. 652, 104th Cong., § 251(j) (1995); S.R. Rep. No. 104-23, at 93 (1995). The Report accompanying S. 652 made it clear that State rules give way to FCC regulations. S.R. Rep. No. 104-23, at 22 (1995). However, this provision from S. 652 was not included by the Conference Committee in the Act.

[25] Section 251(d)(3) of the 1996 Act, 47 U.S.C. § 251(d)(3), provides in pertinent part:

> [T]he Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that – (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

> state rule, even though it differed from an FCC regulation.[26]

(Pet. App. 38a). The Eighth Circuit further stated that the FCC's rules under section 251 "will be in force only where there are no comparable state rules on access and interconnection obligations, or where such state rules conflict with the substantive provisions of section 251 or substantially prevent their implementation." (Pet. App. 40a, n.28).

In *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), this Court held that the premature preemption of State regulation without evidence of the precise nature of the State regulation preempted amounted to a "purely facial challenge" to the State regulation. 480 U.S. at 580, 589, 593. In order to uphold preemption under these circumstances, the federal government had to demonstrate that "there is no possible set of conditions the [State] could place on its [regulation] that would not conflict with federal law – that any State [regulatory] requirement is *per se* pre-empted." *Id.* at 580. The FCC has failed to make any attempt to demonstrate that only its pricing requirements comply with section 251(d)(3). Therefore, assuming *arguendo* that the FCC has pricing authority, which it does not, its across-the-board preemption of State pricing regulation cannot stand.

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[26] The Eighth Circuit expressly "left for another day any determination of whether a *specific* state access or interconnection regulation is inconsistent with section 251 or substantially prevents the implementation of section 251 or Part II of the Act." (Pet App. 39a, n.27).

4. The legislative history of sections 251 and 252 confirm that Congress did not intend for the FCC to preempt the States.

The legislative history of sections 251 and 252 demonstrates that Congress considered granting the FCC jurisdiction over pricing, but chose not to do so. The bill adopted by the House, H.R. 1555, expressly assigned the FCC authority over the pricing of local service elements. *See* H.R. 1555, 104th Cong., § 242(b)(4) (1995); H.R. REP. NO. 104-204, at 4 (1995). Significantly, however, this provision of H.R. 1555 did not become law.

In the Senate bill, sections 251 and 252 were integrated into one section. States were required to impose conditions consistent with both the section and the FCC's rules. *See* S. 652, 104th Cong., § 251 (1995); S.R. REP. NO. 104-23, at 88-94 (1995). However, this section was divided into two during the conference process. The Conference Report on S. 652, 104th Cong., 2d Sess., describes the new section 251(d) as requiring the FCC "to adopt regulations to implement new section 251." S.R. CONF. REP. NO. 104-230, at 122 (1996). The subsequent separation of the 251 and 252 sections, and the addition of pricing standards in new section 252(d), indicate that the adopted 251(d) was intended to support FCC regulations governing that section only.

B. Neither Section 201(b) Nor Other Provisions of the Act Provide the FCC with Authority Over Intrastate Rates.

In what can only be described as a "bootstrap" argument, the FCC claims that once Congress legislates in the

intrastate area section 201(b) provides it with authority to prescribe regulations over intrastate matters.[27] (FCC br. at 19-21). It claims its rulemaking authority is coextensive with the reach of the Act.

The FCC does not derive any additional powers to regulate intrastate telecommunications from section 201(b) and should not be allowed to call upon general authority to expand express limitations.[28] The Eighth Circuit correctly found section 201(b) does not supply the FCC with authority to regulate the rates of local phone service. (Pet. App. 12a). While this section purportedly empowers the FCC "to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter," it is limited by the terms of section 201(a) to granting the FCC authority over common carriers engaged in interstate or foreign communications. *See* 47 U.S.C. § 201(a); *see also Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("Section

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[27] The cases relied on by the FCC (FCC br. at 20) and AT&T (AT&T br. at 23, n.13) for the proposition that Congress gave the FCC expansive rulemaking power under section 201(b) to avoid the need for specific authority, are inapplicable here. These cases address extension of FCC authority in interstate communications, a subject to which section 201(b) applies. This section does not allow the FCC to use general authority to preempt the States of duties expressly reserved to the States by Congress.

[28] Neither do 47 U.S.C. §§ 154(i) or 303(r) provide such authority. As the Eighth Circuit found, these sections "merely supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute. Neither subsection confers additional substantive authority on the FCC." (Pet. App. 12a, 86a).

201(b) of the Act mandates that any *interstate* communications charge, practice . . . " (*emphasis added*)).

The legislative history of this particular provision in section 201(b) indicates its purpose may be even narrower. The directive that "the Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter," was added by a chapter amendment in 1938, directing the FCC to permit radio companies to furnish reports of the location and positions of ships at sea to newspapers without charge or at a nominal charge in furtherance of the public interest.[29] This 1938 amendment was not a grant of general authority from Congress but an absolute directive to the FCC in handling information about ships at sea.[30]

The FCC and other parties also argue that other sections of the Act presume that the FCC has rulemaking and enforcement authority. For example, the petitioners rely on 47 U.S.C. § 160 as evidence of the Commission's authority to issue regulations pursuant to the Act because this section allows the Commission to forbear from applying regulations or provisions of the Act. (FCC br. at 24-25; AT&T br. at 30; MCI br. at 37-38). As explained by the Eighth Circuit, " . . . this power is limited to forbearing from applying those provisions that pertain to interstate telecommunications or the portions of the Act addressing intrastate telecommunications that also specifically call for the FCC's involvement. . . . " (Pet. App.

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[29] Act of May 31, 1938, ch. 296, 52 Stat. 588.

[30] H.R. Rep. No. 1258, 75th Cong., 1st Sess. (1938).

86a). The forbearance authority is not a grant of, nor is it evidence of, any underlying substantive authority.

The FCC also argues section 253 provides evidence of Congressional intent that State interconnection and access rules must be consistent with the Commission's regulations.[31] To the contrary, section 253 is evidence of Congressional intent to limit preemption. This section limits the FCC's ability to preempt State statutes or regulations that have "the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Before the FCC is allowed to exercise such authority, there must be "notice and an opportunity for public comment" and the preemption is expressly limited "to the extent necessary to correct such violation or inconsistency." 47 U.S.C. § 253(d).

AT&T contends the FCC's complaint authority under section 208 allows any party to file a complaint with the FCC that claims that a common carrier has violated any requirement of the Act, including claims involving a review of interconnection agreements approved by State commissions. (AT&T br. at 30-31). It argues section 208 presumes the FCC's enforcement authority. However, the Eighth Circuit correctly rejected this view finding section 208 does not authorize the FCC to review State commission determinations or to enforce the terms of interconnection agreements. (Pet. App. 31a-34a). While the FCC has general complaint authority, it does not extend to

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[31] Despite the FCC's claim to the contrary, there is nothing in this section that directly or indirectly authorizes the FCC to regulate intrastate rates. In fact, preemption is only permitted to eliminate barriers to entry.

review of State commission decisions under section 252. Exclusive review of State commission decisions is vested in the federal district courts. 47 U.S.C. § 252(e)(6).

Finally, contrary to the FCC claim, section 271 does not provide an express grant of authority for FCC preemption of pricing and is not evidence of the FCC's plenary authority to issue rules implementing the Act's local competition provisions. (FCC br. at 29). Under section 271, the FCC is granted the exclusive authority to grant or deny a regional Bell operating company entry into the long-distance market in the States in which it provides local exchange service under the AT&T consent decree. Although the decision to grant or deny entry belongs to the FCC its duty can be – in fact, must be – discharged while giving effect to the State pricing decisions.

The FCC inquiry under section 271 concerns, generally, whether competitive conditions prevail in the applicant's local exchange market. Included in that inquiry is a competitive checklist, including requirements that the applicant meets access and interconnection requirements including conformance to the Act's pricing sections regarding interconnection, network elements, reciprocal compensation, and resale, cross-referencing the substantive subsections. 47 U.S.C. §§ 271(c)(2)(B)(i), (ii), (xiii), and (xiv). However, each of these cross-referenced sections expressly authorizes States to establish rates for these network components. In other words, section 271 itself requires the FCC to respect the State pricing determinations. Indeed, presumably the FCC would also have

to accept prices arrived at through interconnection agreement negotiations and approved as nondiscriminatory by State commissions.[32]

The recent decision of the D.C. Circuit upholding an FCC section 271 determination does not dictate a contrary view. *See SBC Communications, Inc. v. FCC*, 138 F.3d 410 (D.C. Cir. 1998). In *SBC*, the court held that the Commission is not obliged to defer to the Oklahoma commission's judgment that SBC satisfied the section 271(c)(1)(A) requirement of the presence of a facilities-based competitor. In contrast to sections 271(c)(2)(B)(i), (ii), (xiii) and (xiv), however, that section contains no cross-references to State authority, nor is that determination anywhere reserved to the States.

C. SECTION 152(b) AND THIS COURT'S DECISION IN *LOUISIANA* PROHIBIT THE FCC FROM ADOPTING RULES FOR SETTING INTRASTATE RATES.

Section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b), provides in pertinent part:

> [N]othing in this chapter shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communications service by wire . . . of any carrier. *(emphasis added).*

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[32] The FCC may reject an application which is inconsistent with the public interest, convenience, and necessity. 47 U.S.C. § 271(d)(3)(C).

The Eighth Circuit held that "any ambiguity regarding the FCC's vacuum of authority over local telecommunications pricing under the Act is resolved by the operation of section 2(b) of the Communications Act of 1934."[33] (Pet. App. 15a). In challenging the Eighth Circuit's reading of section 152(b), the petitioners have simply misread both section 152(b) and this Court's decision in *Louisiana*.

1. FCC efforts to circumvent the plain, anti-preemption language of section 152(b) have been squarely rejected by the Court.

The Court in *Louisiana* held that section 152(b) denies jurisdiction to the FCC by fencing off State regulation of local telecommunications matters from FCC intrusion. In attempting to justify its preemption of State regulation of depreciation charges relating to local rates, the FCC had argued that section 152(b)'s jurisdictional fence only safeguarded the States' regulation of retail rates. The Court rejected the FCC's narrow reading of section 152(b), which was actually fairly broad when compared to that proposed by the petitioners in this case. In the Court's words:

> [G]iven the breadth of the language of section 152(b), and the fact that it contains not only a substantive jurisdiction limitation on the FCC's power, but also a rule of statutory construction (" . . . nothing in this chapter shall be construed

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[33] The State Respondents and NARUC support the State of California's position that the Eighth Circuit was correct in holding section 152(b) fences off intraLATA dialing parity from the FCC's jurisdiction. (Pet. App. 73a-91a).

> to apply or to give the Commission jurisdiction with respect to . . . intrastate communications service . . . "), we decline to accept the narrow view urged by respondents, and hold instead that it denies the FCC the power to preempt state regulation of depreciation for intrastate ratemaking purposes.

Id. at 373. The Court went on to clarify that the congressional denial of power to the FCC in section 152(b) can only be overcome if Congress included "unambiguous" and "straightforward" language in the Act either modifying section 152(b) or expressly granting the FCC additional authority. *Id.* at 377.

The FCC and various telephone companies also contended in *Louisiana* that section 152(b)'s jurisdictional limitations had to give way to section 220, which calls on the FCC to set depreciation charges, because Congress could not have intended in section 152(b) to prohibit the FCC from carrying out a responsibility that Congress had expressly assigned the FCC in another provision.[34] The Court unequivocally rejected that argument, noting that section 220 did not expressly empower the FCC to set *intrastate* depreciation charges, and, in any event, a general expression of an FCC duty would not override a specific limitation of FCC jurisdiction. *Id.* at 370.

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[34] As the Court noted, section 220 was reenacted, almost verbatim, from a provision in the Interstate Commerce Act, which arguably had been previously construed to require the ICC to prescribe depreciation for both telephone companies and railroads. *Depreciation Charges of Telephone and Railroad Companies*, 118 I.C.C. 295 (1926). 476 U.S. at 378, n.6.

Petitioners now argue that section 152(b) is a rule of statutory construction and does not limit the FCC's substantive jurisdiction under sections 251 and 252. Their position is belied by the *Louisiana* holding that 152(b) is an express limitation on the FCC's substantive jurisdiction as well as a rule of statutory construction. *Id.* at 373. Further, it ignores the fact that neither section 251 nor section 252 empowers the FCC to intrude on the States' jurisdiction over local rates and services. Indeed, the FCC itself recognized that sections 251 and 252 do not contain an explicit grant of intrastate authority to the Commission. (Pet. App. 191a).[35]

Thus, the FCC's attempt to override section 152(b) with the directives of sections 251 and 252 regarding interconnection and access, resale and termination and transport is far weaker than the case that it unsuccessfully made in *Louisiana* for overriding section 152(b)'s jurisdictional limitations with section 220's reference to depreciation charges.

The absence of an explicit grant of federal authority in sections 251 and 252 is fatal to the FCC's jurisdictional claim because Congressional intent to preempt State regulation of intrastate matters must be unambiguous, clear and manifest. *Id.* at 368-69, 377; *see also Rath Packing*, 430 U.S. at 525. As no such clear expression appears in any

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[35] The sole directive to the FCC in section 251(d)(1) compels the Commission to complete expeditiously its rulemaking *in those instances* in section 251 where Congress expressly called for the FCC's involvement. On the other hand, unambiguous and straightforward preemption authority is evidenced in sections 251(e)(1), 253, 276(b), and 276(c).

areas other than those six areas cited above, section 152(b) prohibits the FCC from intruding on the States' jurisdiction.

2. This Court has previously concluded that section 152(b)'s jurisdictional prohibitions are not limited to the FCC's ancillary jurisdiction.

According to the petitioners, section 152(b) only precludes the exercise of the FCC's ancillary jurisdiction. This argument rests on a strained reading of the Supreme Court's decision in *Houston Texas Ry. v. United States*, 234 U.S. 342 (1914) (*The Shreveport Rate Case*). The Supreme Court has expressly stated that the statute was enacted not only to avoid a reenactment of *Shreveport*, but also to preserve the States' "broad powers to regulate" local matters. *Louisiana*, 476 U.S. at 372. As the Court reasoned in footnote 5, the specific language of section 220, which was not an "ancillary" duty, did not breach the section 152(b) fence.[36] Petitioners may not now, despite *Louisiana*,

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[36] In *Louisiana*, the Court noted the FCC maintained "that since '[specific] terms prevail over the general,' *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957), and § 220 deals specifically with depreciation, the general language of § 152(b) should not be read to bar FCC regulation of depreciation. The rule of construction cited by respondents is simply inapplicable in the context of these cases. First, § 152(b) deals with jurisdiction, and thus addresses a different subject than § 220, which respondents correctly characterize as involving depreciation. Thus, while § 152(b) may be more "general" than § 220, the sections are not general or specific with respect to each other. Second, § 152(b) not only imposes jurisdictional limits on the power of a federal agency, but also,

simply claim that section 152(b) merely serves to protect against ancillary FCC authority.

3. Petitioners' interpretation of section 152(b) contradicts its legislative history.

The legislative history of section 152(b) evidences a Congressional intent to preserve State jurisdiction over intrastate communications. States have historically exercised the lead role in regulating the local telecommunications network. In fact, prior to the passage of the Communications Act of 1934, the role of the ICC was minimal. Against this backdrop of State regulatory authority Congress enacted the Communications Act of 1934.

Congress specifically invited State regulators to draft the provision that ultimately became section 152(b)(1) for the purpose of preserving State regulatory authority.[37] As

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by stating that nothing in the Act shall be construed to extend FCC jurisdiction to intrastate service, provides its own rule of statutory construction. In other words, the Act itself, in § 152(b), presents its own specific instructions regarding the correct approach to the statute which applies to how we should read § 220." *Louisiana*, 476 U.S. at 376 n.5.

[37] The State proposal originally appeared as section 210 of the Act. During the Act's development, however, Congress moved this provision to section 152(b). A statement by one of the ICC commissioners indicates the move was made because it was "more logical" to place all of the provisions relating to the Act's application in a single section. Hearings on S. 2910 before the Senate Interstate Commerce Committee, 73d Cong., 2d Sess. 210 (1934) (statement of Mr. McManamy).

Senator Dill, Chairman of the Interstate Commerce Committee explained, section 152(b) was included "to protect the State Commissions against being overridden by [the FCC] as the Interstate Commerce Commission has overridden some of the Railroad State Commissions." Hearings on S. 2910 before the Senate Interstate Commerce Committee, 73rd Cong., 2d Sess. 179 (1934). The States ultimately supported the Act because it protected State authority over telecommunications from FCC preemption.

The history of the battle of the 1996 Act establishes that Congress intended to reserve intrastate telecommunications regulation to the States. The Telecommunications Act of 1996 was one of the most heavily lobbied bills in the history of this country. Even the FCC acknowledged that early drafts of the 1996 Act would have excepted Title II, sections 251 and 252, from the applicability of section 152(b), but in the conference process the exception was deleted and section 152(b) was retained. (Pet. App. 187a-188a, 197a).

In dismissing the significance of this history, the FCC concludes that the final language retaining section 152(b) was nothing more than a "technical, nonsubstantive change." (FCC br. at 33, n.13). However, as explained by the Supreme Court in *Russello v. United States*, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." 464 U.S. 16, 23-24 (1983).

MCI cites *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989), in which the Supreme Court chose not to "attach

decisive significance to the unexplained disappearance of one word from an unenacted bill because 'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent." (MCI br. at 33). Here, however, the Conference Committee affirmatively removed language that would have expressly excepted the local competition provisions from the protection of section 152(b), a repeatedly litigated and universally understood reservation of State authority that has existed under the statute for more than 60 years and under federal common law for nearly a century. Under these circumstances, it cannot be assumed that the omission of the exception was unintentional.[38] *Cf. In re Burns*, 887 F.2d 1541, 1551-52, text and n.11 (11th Cir. 1989) (explaining *Tilley*). Section 152(b)'s retention in the 1996 Act evidences Congress' decision that the regulation of local telephone rates and services shall remain fenced off from the FCC.

4. The "impossibility" exception provides no support for the FCC's attempt to preempt local ratemaking.

Various petitioners claim the "impossibility" exception to section 152(b) justifies the FCC's preemptive rulemaking on local competition matters. The so-called "impossibility" exception relates to language in *Louisiana*, where the Court distinguished its decision to annul the

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[38] MCI's reliance on the Standing Rules of the Senate is also misplaced. (MCI br. at 35). The remedy for violation of that rule is by a Senator's point of order. If no point of order is made, any objection is waived. No point of order was raised with respect to the amendment to section 2(b).

FCC's depreciation preemption order from two decisions of the Fourth Circuit Court of Appeals that had upheld FCC decisions requiring States to allow customers to own their own telephones. 476 U.S. at 375 n.4. Several circuit court decisions subsequently interpreted footnote 4 as allowing FCC preemption where it was not possible for the FCC to carry out a regulatory duty without preempting the States because State regulation of the activity to be regulated by the FCC would have rendered it impossible for the FCC to fulfill its responsibility. *See, e.g. Pub. Util. Comm'n of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989); *Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990).

In order to establish that State regulation of local interconnection, unbundled network elements and resale rates would render it impossible for the FCC to carry out an express duty, the petitioners would have to establish that sections 251 and 252 presented the FCC with an "unambiguous" and "straightforward" duty to regulate these prices. The FCC can make no such showing. The petitioners attempt to stretch dicta from intermediate courts into a "principle" that would circumvent this Court's holding of *Louisiana*. The fact remains the so-called "impossibility" exception, when properly read, derives from, and reinforces, this Court's holding that section 152(b)'s jurisdictional limitations can only be overridden by an unambiguous direction from Congress that the FCC regulate local matters. Again, sections 251 and 252 contain no such direction.

D. "ONE SIZE FITS ALL" RATES FOR LOCAL TELEPHONE SERVICES WOULD ONLY IMPEDE COMPETITION.

The preemption order reflects a decision by the FCC to substitute its perception of how to promote competition for the will of Congress. In defending its decisions, the FCC claims State authority over pricing will impede competition in local markets. (FCC br. at 39-42). In *Louisiana*, the FCC, and supporting intervenors (e.g., AT&T and MCI) claimed that States' continued regulation of local depreciation charges would lead to antiquation of our national telecommunications network. *Louisiana*, 476 U.S. at 358-359. The Court unequivocally rejected such tactics as irrelevant to Congress' intent in enacting the Communications Act. As the Court stated:

> [W]e do not assess the wisdom of the asserted federal policy of encouraging competition within the telecommunications industry. Nor do we consider whether the FCC should have the authority to enforce, as it sees fit, practices which it believes would best effectuate this purpose. Important as these issues may be, our task is simply to determine where Congress *has* placed the responsibility . . . .

476 U.S. at 359 *(emphasis in original)*. *Louisiana* teaches that the FCC may not take preemptive action simply because it thinks such action will best effectuate federal policy. It is not the function of the FCC or of the courts "to assure that the principal goal of a statute is pursued with maximum efficiency, but rather to assure that it is pursued with that *degree* of efficiency that Congress intended. . . ." *Illinois Commerce Comm'n v. Interstate Commerce Comm'n*,

749 F.2d 875, 887 (*Scalia, J. dissenting*) (D.C. Cir. 1984). Congress expressly reserved pricing to the States.

The FCC "determined that a national framework for implementing the 1996 Act – a framework that, for the foreseeable future, only the Commission can provide – is necessary to avoid the anticompetitive uncertainties that would impair effective implementation of the 1996 Act." (FCC br. at 41). However, Congress can combine federal and State regulatory power through any form of cooperative or creative federalism it finds appropriate to a particular field of regulation. *FERC v. Mississippi*, 456 U.S. 742 (1982); *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Delegating to the State commissions the authority to make pricing decisions in accordance with standards in the statute enhances the prospect that the resulting policy will reflect local needs and concerns and therefore promote the national interest.

The proper relationship between the retail rates and the rates set for competitive entry in each State is essential to promote competition. If the rates for interconnection and unbundled network elements, transport and termination, and resale are too low or too high in relation to the retail rates, efficient, economic entry will not be achievable.

The FCC asserts local competition would be growing far faster if its national pricing rules had been allowed to take effect. (FCC br. at 41). This claim is baseless. There has been appreciable progress in breaking down competitive barriers and in State approvals of interconnection agreements. Since the Telecommunications Act of 1996 has been in effect, State commissions have met each of the

deadlines and responsibilities imposed by the Act. As indicated in a report compiled by the National Association of Regulatory Utility Commissioners (NARUC) and published in September of 1997,[39] State commissions have certified more than 1110 new local service competitors. Over 180 arbitrations have been completed in accordance with the process set out in section 252(b). Over 500 interconnection agreements have been approved pursuant to section 252(d) and are available as a framework for providing local service.

Delay can be attributed to other factors. First, the FCC's regulatory overreaching has engendered time-consuming litigation and market uncertainty. In addition, the realignment of the local telecommunications market entails major financial investment and corporate restructuring decisions, with far-reaching consequences. Finally, the speed of widespread competitive entry has been slowed, in part, by the uneven pace of technological solutions to the complex problems of interconnection with the existing network and the development of alternative networks.

Congress' decision to grant the State commissions express authority to set these prices, under broad federal standards, allows States to account for local conditions, mitigates against undesired or unanticipated rate impacts, and promotes competitive entry. Allowing the FCC to establish and enforce preemptive pricing standards could lead to pricing results that would impede

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[39] *See* NARUC *"Telecommunications Competition 1997, A State-By-State Report on Pro-Competitive Measures in Intrastate Telecommunications."* (1997).

rather than promote competition. Making competition work is as important as the speed the FCC touts would have been achieved through imposition of its national rules. (FCC br. at 40).

Congress' carefully crafted framework for implementing local competition provides for national consistency and uniformity where necessary[40], and allows for local or carrier-specific variations,[41] where Congress deemed such latitude vital to successful implementation of its pro-competitive policy. Far from simply enacting a broad statement of policy and assigning the FCC to develop the detailed rules for its implementation, Congress delineated its own specific implementation framework, providing sufficient direction for both State and federal regulators to carry out their respective assigned duties. As this Court has often stated, "our task is to determine where Congress *has* placed the responsibility. . . . " *Louisiana*, 476 U.S. at 359, 376, and "[w]hen we find the terms of a statute unambiguous, judicial inquiry is [essentially] complete . . . " *Garcia v. United States*, 469 U.S. 70, 75 (1984); *see TVA v. Hill*, 237 U.S. 153, 187 n.33 (1978); *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

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[40] For example, section 251(e)(1) provides exclusive Commission jurisdiction over the portions of the North American Numbering Plan pertaining to the United States.

[41] *See*, section 251(f)(2) (State determination of exemptions and modifications for rural carriers) and section 252(d) (pricing standards).

CONCLUSION

The judgment of the court of appeals pertaining to jurisdiction should be affirmed as discussed above.

Respectfully submitted,

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